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In The
Supreme Court of The United States

No. 73-1174

STATE OF NORTH CAROLINA,
Petitioner,

-vs.-

JOHN PAUL WRENN,
Respondent.

Response in Opposition to Petition
for Writ of Certiorari

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RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

Petitioner was tried and convicted of possession of marijuana in Wake Superior Court. This conviction was affirmed by the North Carolina Court of Appeals. 12 N. C. App. 146, 182 S.E. 2d 600 (1971). Appeal to the Supreme Court of North Carolina was dismissed. 279 N. C. 620, 184 S.E. 2d 113 (1971). Petition for Certiorari to the Supreme Court of the U. S. was denied. 405 U. S. 1064 (1971) Petition for writ of Habeas Corpus was allowed in the United States District Court for the Eastern District of North Carolina. No. 3040 (August 10, 1972). This decision was affirmed by the United States Court of Appeals for the Fourth Circuit. *John Paul Wrenn v. State of North Carolina,* No. 72-2176 (November 5, 1973).

JURISDICTION

The jurisdiction of this Court has been invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

I.

WHERE THE AFFIDAVIT TO OBTAIN A SEARCH WARRANT DETAILS EVENTS WHICH, THE AFFIANT TESTIFIES AT THE TRIAL, NEVER OCCURRED, SHOULD THOSE EVENTS BE STRICKEN FROM CONSIDERATION IN DETERMINING WHETHER PROBABLE CAUSE WAS ESTABLISHED?

II.

DOES THE "PLAIN VIEW" EXCEPTION APPLY WHERE THE STATE OFFERS NO EVIDENCE TO ESTABLISH THE CIRCUMSTANCES UNDER WHICH EVIDENCE WAS OBTAINED?

STATEMENT OF THE CASE

On July 15, 1968, State and Wake County law enforcement officers conducted a search of Respondent's apartment and yard in Knightdale, North Carolina. Vegetable material was seized which proved, on analysis, to be marijuana. Respondent was indicted for illegal possession of marijuana on July 29, 1968, and was tried in Wake Superior Court on February 1, 1971. He was convicted and sentenced to a term of from one to two years in the State's prison.

At issue at the trial, and throughout the appellate proceedings which followed, was the question of the validity of the search. The facts out of which this issue arises will be stated in the argument which follows.

ARGUMENT

THE DECISION OF THE DISTRICT COURT IS NOT INCONSISTENT WITH DECISIONS OF THIS COURT.

A. *THE QUESTION OF THE AFFIDAVIT'S ACCURACY*

The Petitioner does not contend that the District Court had no right to inquire into the accuracy of the information in the affidavit by which the search warrant was obtained. It is argued, rather, that the inaccuracies related to "peripheral matters." (Petition, page 5).

The inaccuracies in the affidavit were as to crucial matters which went to the heart of the finding of probable cause and arose in the inconsistencies between the affidavit used to obtain the warrant, and the affiant's testimony on the *voir dire* at the trial.

The *affidavit* states that July 12, 1968, was the date on which the affiant first came into possession of the information. The affiant *testified,* on *voir dire,* that he got the information on July 13, 1968.

It is submitted that a reading of the affidavit and the affiant's testimony on the *voir dire* leaves one totally confused as to when the affiant first went to the Petitioner's premises. More important than any question as to the date on which particular events occurred, however, is the allegation in the affidavit of events which admittedly never occurred at all.

(1) *The version testified to on voir dire.*

The story told by the affiant on *voir dire,* at the trial, was substantially this: Prior to July 13, 1968, he had never heard of Respondent. On that date, a law enforcement officer brought him a sample of a growing plant obtained from Respondent's back yard. The sample, upon analysis, proved to be marijuana. Affiant then went to, and observed, the premises from the street.

(2) *The version stated in the affidavit.*

It is obvious that a Magistrate reading the affidavit in this case would come away with a totally different version of the information available to the affiant, as examination of the allegations in question shows. The crucial paragraph in the affidavit reads as follows:

> "That on July 12, 1968 the Affiant examined the yard area located immediately behind the above described apartment and there found a quantity of growing suspected marihuana plants. The portions of one of the suspected marihuana plants were recovered, deliverd to W S Best Chemist of the State Bureau Investigation Chemical Laboratory in Raleigh, NC that subsequently said Chemist Best advised the Affiant that the suspected marihuana was and is marihuana."

A common sense reading of the above allegation in the affidavit leads to a conclusion substantially as follows:

The affiant went to the apartment of John Paul Wrenn on July 12, 1968, and went into the yard and looked around. While looking around, he came upon some growing plants which he believed to be marijuana. When he came upon these plants, he took samples of one of them and left the premises. Upon leaving the premises, the affiant took the samples to Chemist W. S. Best of the State Bureau of Investigation Laboratory who confirmed that the samples were marijuana.

It is not a strained technical reading of the affidavit but a common sense reading which renders the basic outline detailed above. However, analysis of the language of the allegation reveals why the above story is conveyed.

First, *the chronology of events*. In ordinary language, events are stated in the order in which they occurred. If that were not true, sentences in every day conversation would begin either, with the word "thereafter", or with the phrase "before that", to indicate when an event occurred. It is common sense to infer that an event stated in sentence number one preceded an event stated in sentence number two.

Second, *the use of the word "examined"* in describing what the affiant did to the yard area implies the kind of

scrutiny which only closeness may permit. An examination has been defined as a "search". *Black's Law Dictionary* (4th Ed. 1951). The word "examined" has been defined as follows: "To inspect closely." *Webster's Seventh New Collegiate Dictionary* (1965). In ordinary usage as well, the word "examine" is not used to describe looking at something from some distance away. One might "observe" a yard area from the street but one "examines" a yard by going upon it.

Third, *the use of the word "found"* in describing what the affiant did to the growing plants. The word "find" implies that one has come upon something. One does not ordinarily speak of "finding" something when he has merely observed it from some distance away.

Fourth, *the fact that no one was named* in the second sentence as being the person who "recovered" and "delivered" the samples implies that the affiant is the person who did this. If someone is identified in a sentence and, in a following sentence, an act is described which obviously was carried out by a person, the inference is that the person named in the first sentence did the act described in the next sentence. Here, common sense tells the reader that if the affiant examined the yard then the affiant *recovered* the plants.

It is submitted that these factors in combination with each other painted a picture in the affidavit quite unlike that painted by the affiant on the *voir dire.*

The picture thus conveyed to the Magistrate was erroneous in several critical respects:

First, the "portions of one of the suspected marijuana plants" were not recovered on July 12, 1968. Such portions were *delivered* to the affiant on either July 12, 1968, or July 13, 1968, but the affiant *did not know* when the samples were obtained from the premises.

Second, the affiant did *not ever go on the* premises. (He "observed" but did not "examine").

Third, the affiant did not ever come upon some growing plants in the yard. (He "saw" them but he did not "find" them).

Fourth, the affiant did not ever take samples of one of the plants. (Portions were "recovered" but not by the affiant).

Thus, the magistrate issued a warrant in the belief that knowledge of these plants was obtained personally by the affiant in a personal visit to the premises; in truth, all of this was supplied by an informant. Had the magistrate known this, several questions would have presented themselves:

Was the informant worthy of belief?
Why was the informant worthy of belief?
How did the informant acquire the samples?
When did the informant acquire the samples?

In effect, the affiant paraded before the magistrate as first-hand information what was, in fact, second-hand information without having to credit the informant. Clearly, the two sentences in question which erroneously stated that affiant visited the premises and obtained samples of plants ought to be stricken. The District Court was correct in ordering that they be stricken.

B. *THE QUESTION OF "PLAIN VIEW"*

The Petitioner argues that even if the warrant were invalid, the search was still legal because the plants in the backyard were in "plain view." This case does not come within the "plain view" exception because (1) there is no evidence that the plants were in plain view of the affiant, (2) there is no evidence that the plants were in plain view of the officer who initially entered the yard, and (3) the burden of justifying any entry was on the State.

(1) There is no evidence that the plants were in plain view of the affiant. He testified that he could see the plants but did not feel his observation was enough to justify his going on in and seizing them. In addition, he went there to look for marijuana because of information from the first officer — information Respondent contends was wrongfully obtained.

(2) There is no evidence that the plants were in plain view of the officer who initially entered the yard. The *identity* of this officer has never been revealed. *When* he

went to the premises has not been revealed. *What* he saw when he went there has never been revealed. *Why* he went on the premises has never been stated, even as hearsay.

(3) The burden of justifying any entry of the premises was on the State. Were the plants visible to the first officer and did he enter the premises because they were visible? These questions must be answered by the State, not the Respondent. *Chimel v. California,* 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969).

CONCLUSION

The decision of the District Court, affirmed by the United States Court of Appeals for the Fourth Circuit, is not inconsistent with decisions of this Court and the Petition for Certiorari, therefore, should be denied.

This 19th day of April, 1974.

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CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing Response to Petition for Certiorari by placing three copies in the United States Mail at Raleigh, North Carolina, postage prepaid, addressed to Richard N. League, Assistant Attorney General, Department of Justice, Post Office Box 629, Raleigh, North Carolina 27602, on the 19th day of April, 1974.

WADE M. SMITH
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